



# ZIMBABWE·LAW·REVIEW

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# **NO FAULT DIVORCE: CHANGING DIVORCE LAWS IN ZIMBABWE**

WELSHIMAN NCUBE\*

## **INTRODUCTION**

Prior to the enactment of the Matrimonial Causes Amendment Act No. 11 of 1987 there were two different sets of divorce laws in Zimbabwe, one applicable to monogamous marriages contracted under the general law and the other to potentially polygamous or polygamous marriages contracted in terms of customary law. Thus the dissolution of monogamous marriages contracted under the Marriage Act, Chapter 37, or under some foreign law took place in terms of Roman-Dutch common law and statute law whereas the dissolution of customary law marriages took place in accordance with customary law.

The Matrimonial Causes Amendment Act abolished this dichotomy and provided for a single divorce law applicable to both customary and general law marriages.

Because a full appreciation of the present divorce law is impossible without an understanding of the old divorce law it is instructive to begin by presenting the history of the divorce laws in Zimbabwe.

## **I HISTORICAL DEVELOPMENT OF DIVORCE LAWS IN ZIMBABWE**

### *As Under the General Law*

At the time that the Roman-Dutch common law was introduced as the general law of Zimbabwe by Section 19 of the High Commissioner's Proclamation of 10 June 1891, it recognized adultery and malicious desertion as the only two grounds for divorce. These remained the only grounds until 1943 when the Matrimonial Causes Act, Chapter 39 was enacted. This Act, apart from attaching certain conditions to the common law ground of malicious desertion, introduced cruelty, incurable insanity and long term imprisonment as new grounds for divorce. There were now five grounds for divorce, all of them except for insanity being based squarely on the guilt principle in that they assumed the commission of a matrimonial offence by one or other of the spouses.

To obtain divorce on the ground of adultery the plaintiff had to prove voluntary sexual intercourse between his or her spouse and a third party.<sup>1</sup> Because the Roman-Dutch common law was based on the guilt principle a decree

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<sup>1</sup> Note that because of its nature the act of adultery often has to be proved on the basis of circumstantial evidence, see *Sidube v Miallmiss* HC-B-130-87.

of divorce on the ground of adultery could not be granted to a plaintiff who had himself or herself committed adultery. However, Roman-Dutch common law conferred a discretionary power on the court to condone the plaintiff's adultery if such condonation was in the interests of the parties and society as a whole.<sup>2</sup> The effect of the condonation was to wipe out the plaintiff's adultery and thereby entitle him or her to obtain divorce.

It was possible for the innocent spouse to condone<sup>3</sup> or forgive the adultery of the guilty spouse. Such condonation had the effect of wiping out the adultery and thereby making it impossible for the innocent spouse to rely on the condoned acts of adultery to obtain divorce.

For divorce to be granted on the ground of malicious desertion it had to be shown that the parties had been married for at least three years and that a period of at least six months had elapsed since the desertion.<sup>4</sup> However, an action for divorce could be instituted before the expiration of either period provided that a final order of divorce could not be granted before the expiration of both periods.

Malicious desertion existed whenever one spouse deserted the other out of malice in order to put an end to the marriage. There are three main forms of malicious desertion, namely physical desertion,<sup>5</sup> constructive desertion<sup>6</sup> and refusal of conjugal rights or marital privileges.

To obtain divorce on the ground of cruelty the plaintiff was required to show that the defendant had, during the subsistence of the marriage, treated the plaintiff with such cruelty as made the continuance of married life insupportable.<sup>7</sup> Habitual drunkenness or mental cruelty which made the continuance of married life insupportable were all treated as cruelty for purposes of divorce.<sup>8</sup>

Any conduct that is so grave and weighty as to cause, or be likely to cause, injury or reasonable apprehension of injury to the health of the other party amounts to cruelty. Thus to constitute cruelty in the legal sense conduct must be

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<sup>2</sup> See H. Hahlo, *The South African Law of Husband and Wife*, (4th ed.) Juta, Durban, 1975 pp.370-371 and *Ex parte F* 1962(1) SA 48 (SR).

<sup>3</sup> Condonation was understood as full forgiveness in the light of full knowledge — see *Bell v Bell* 1909 TS 500 at p.509 where Innes CJ stated that "The injured spouse must have knowledge of the offence, must fully forgive it and must be prepared to take back the guilty partner; the latter must be willing to accept forgiveness and to take advantage of the pardon and reconciliation must ensue".

<sup>4</sup> See section 2(1) of the repealed Matrimonial Causes Act, Chapter 39, which imposed these two conditions on the common law ground of malicious desertion.

<sup>5</sup> Actual or physical desertion occurs when the defendant leaves the matrimonial home with the intention not to return.

<sup>6</sup> Constructive desertion consists of the innocent spouse leaving the matrimonial home because of the conduct of the defendant, who with the settled intention of bringing the marriage to an end, has driven the plaintiff away by making life in common dangerous or intolerable for the plaintiff.

<sup>7</sup> See section 3(c) of the repealed Matrimonial Causes Act, Chapter 39.

<sup>8</sup> Section 6(1).

"such as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger".<sup>9</sup> The conduct must be higher than the ordinary wear and tear of marriage to an extent that the plaintiff could not be expected to endure it.<sup>10</sup>

In the landmark case of *Hill v Hill*<sup>11</sup> the then Appellate Division of the High Court of Rhodesia decided that there was no requirement in our law that to amount to cruelty the conduct complained of must have been intended by its perpetrator to be cruel towards the plaintiff. Accordingly, the case of *Hill* laid to rest the old notion that an intention to injure the other spouse was an essential element of cruelty.<sup>12</sup> In so doing our courts followed the approach adopted by the English House of Lords in *Gollins v Gollins*<sup>13</sup> where it was held that an intention to injure or to be cruel to the other spouse was not an essential element of cruelty in divorce law.<sup>14</sup>

Divorce could also be obtained on the ground of insanity where it could be shown that the defendant had been under care and treatment for a continuous period of 5 years or for interrupted periods which together amounted in the aggregate to at least 5 years, within the 10 years immediately preceding the divorce action.<sup>15</sup> A plaintiff seeking divorce on the ground of insanity had to establish four conditions, firstly, that the defendant was of unsound mind (that is, mentally disordered or defective); secondly, that he or she had been subject to the provisions of the Mental Disorders Act for a period of not less than 5 years; thirdly, that he or she was incurable<sup>16</sup> and fourthly, that the plaintiff was not to any appreciable extent to blame for the condition of the defendant.<sup>17</sup>

A divorce could be granted where the defendant had been convicted of a crime and either been:

- (i) sentenced to imprisonment for 15 years or more; or
- (ii) declared to be a habitual criminal under the provisions of the Criminal Procedure and Evidence Act, Chapter 59 and after such sentence or declaration had been detained in prison for

<sup>9</sup> *Russel v Russel* [1897] AC 395 at 399. See also *Le Brocq v Le Brocq* [1964] 1 WLR 1085 and *Sheldon v Sheldon* [1966] CA 62.

<sup>10</sup> *Crump v Crump* [1965] 2 All ER 980.

<sup>11</sup> 1969 (3) SA 544 (RAD)

<sup>12</sup> See "Cruelty in Rhodesia Divorce Law", 1969 *RLJ* 129 for a critique of the *Hill v Hill* decision.

<sup>13</sup> [1963] 2 All ER 966.

<sup>14</sup> See also *Williams v Williams* [1963] 2 All ER 994 where the House of Lords took the decision in *Gollins v Gollins* to its logical conclusion by holding that insanity was not necessarily a defence to an action for divorce based on cruelty.

<sup>15</sup> Section 3(a) of Chapter 39.

<sup>16</sup> A person is incurably insane whenever there is no reasonable hope that he or she will be restored to a state in which he or she will be capable of leading a normal social life. See *Ridley v Ridley* 1961 (1) SA 59 (SR).

<sup>17</sup> Section 3(a) as read with Section 4. See also *Thompson v Thompson* 1958 (1) PRB 3.

a continuous period of 5 years, or for interrupted periods which together amounted in the aggregate to at least 5 years, within the 10 years immediately preceding the commencement of the divorce action.<sup>18</sup>

The court could refuse to grant a decree of divorce if it was satisfied that the plaintiff had voluntarily assisted the defendant in the commission of the crime or crimes of which he or she had been convicted.<sup>19</sup>

## B. *Under Customary Law*

In pre-colonial Zimbabwe, the contract of marriage was legally and socially recognized as being a contract between two families and not between the two spouses themselves and thus the power to dissolve a marriage vested in the two families. Accordingly, tribal courts of law did not entertain actions for divorce, save that they entertained disputes as to the amount of roora/lobolo returnable by the husband's family on the dissolution of a marriage. The dissolution of marriage was clearly an extra-judicial affair. Goldin and Gelfand have pointed this out:

"Traditionally, divorce or dissolution of a marriage was arranged between the families of the respective parties. Tribal Courts did not entertain actions for divorce."<sup>20</sup>

When the issue of the dissolution of a marriage arose the two families or their representatives met to decide on an appropriate course of action. They would agree to the dissolution of the marriage only if they thought the union had broken down to an unsalvageable extent.<sup>21</sup>

The colonial state changed not only the forum for the dissolution of African marriages, but also the grounds upon which a customary law marriage could be dissolved. Section 17 of the Native Marriages Act<sup>22</sup> provided that "no marriage solemnized under the Act or the Marriage Act or registered under the Native Marriage Act [Chapter 79 of 1939] or contracted under native law and custom<sup>23</sup> before the 1st April 1918 shall be dissolved except by an order of a competent court."<sup>24</sup>

<sup>18</sup> Section 3(b) of Chapter 39.

<sup>19</sup> See Section 5 of Chapter 39.

<sup>20</sup> Goldin and Gelfand, *African Law and Custom in Rhodesia*, Juta, Durban, 1876, at p.147.

<sup>21</sup> Ibid, p.148.

<sup>22</sup> No. 23 of 1950.

<sup>23</sup> Under the Native Marriage Act African customary unions were recognised as valid marriages and had to be dissolved by a court. By virtue of Section 3 of the African Marriages Act, Chapter 238, such unions are no longer recognised and therefore need not be dissolved by a court. See also *Jefita v James* 1961 SRN 29 where it was held that a "husband" in a customary law union cannot divorce his "wife" because in law they are not married to each other.

<sup>24</sup> The provisions of this section are now embodied in Section 16 of the African Marriages Act, Chapter 238.

The power to dissolve customary law marriages whether solemnized under the African Marriages Act or by customary rites was vested in the Court of the Native Commissioners until 1969 when the African Law and Tribal Courts Act, Chapter 237 gave Tribal Courts the power to dissolve customary law marriages.

In granting divorce the colonial courts departed from the strict customary law regime under which a marriage was dissolved when it had broken down to such an extent that it was irreparable. The District Commissioner's Courts gradually incorporated the guilt principle into the customary law of divorce so that a divorce could be granted only upon proof of some recognized ground for divorce.<sup>25</sup>

It no longer sufficed simply to show that the marriage had irreparably broken down.

The colonial courts held that sterility,<sup>26</sup> impotence,<sup>27</sup> malicious desertion,<sup>28</sup> cruelty,<sup>29</sup> adultery by the wife,<sup>30</sup> barrenness of the wife<sup>31</sup> and a false accusation that the other spouse was a witch or practiced witchcraft<sup>32</sup> were all grounds for divorce at customary law.

It may be noted that under customary law a husband is entitled to a return of part of the *lobolo* he paid whenever a marriage is terminated by divorce.<sup>33</sup>

After independence community courts, which had replaced the District Commissioners' courts, continued to grant divorce on the basis of matrimonial fault or the guilt principle in accordance with the principles laid down by the colonial courts.<sup>34</sup> Thus, until the enactment of the Matrimonial Causes Amend-

<sup>25</sup> Goldin and Gelfand (*supra*) have succinctly put it thus: "Under the influence of western legal systems or more precisely the law of Rhodesia, a court dissolving a valid marriage will do so only upon proof of grounds for divorce which justify an order of divorce". (at p.148).

<sup>26</sup> *Chewa v Bvuta* 1928 SR 98.

<sup>27</sup> *Nondiwa v Munwulimi* 1952 SRN 29.

<sup>28</sup> *Jokonya v Diana and Machingura* 1944 SRN 47.

<sup>29</sup> *Shoniwa v Risi and Mubayiwa* 1944 SR 275.

<sup>30</sup> *Kamberiya v Jessie and Madiba* 1943 SRN 342. Adultery by the husband could not be a ground for divorce since customary marriages are potentially polygamous.

<sup>31</sup> *Teresa and Gwabani v Akupusa* 1958 SRN 549. Note that barrenness is not and has never been a ground for divorce in Ndebele law. See H. Child, *The History and Extent of Recognition of Tribal Law in Rhodesia*, (2nd ed.), Ministry of Internal Affairs, Salisbury, 1976, p.42.

<sup>32</sup> See Bullock, *The Mashona and Matabele*, p.281.

<sup>33</sup> See *Fadzai alb Kurevawabva v Nyamandi* 1978 AAC 8, *Jokonya v Diana and Machingura* (*supra*), *Daniel v Teresa* 1972 AAC 17. These cases also decided that the amount of lobolo returnable depends on the duration of the marriage, the number of children born, the conduct and age of the parties.

<sup>34</sup> See *Msusa v Sithole*, Judgment No. 23 of 1983 of the Bulawayo District Court; *Lanedi Pillie v Billie Pillie* Judgment No. 4 of 1981 of the Bulawayo District Court and *Jairoso Dandara v Alice Katsande* unnumbered judgment of the District Court of Bulawayo dated 23 May 1983.



ment Act, No. 11 of 1987, community courts continued to dissolve customary law marriages on the basis of the fault principle.

### C. *Criticisms of the Old Divorce Law*

The primary object of divorce laws should be the identification of those marriages that have irretrievably broken down so that the empty legal shell can be dissolved with maximum fairness and minimum bitterness, distress and humiliation. Divorce laws satisfying this requirement would be understood and respected by society and would, it is suggested, discourage the formation of illicit extra-marital relationships by facilitating the dissolution of empty marriages.

The old law of divorce based on the guilt principle fell very much short of being a good and sensible divorce law. The fault principle is based on the obviously erroneous premise that there is always a guilty spouse and an innocent spouse in a divorce suit. A law of divorce founded on the guilt principle invents a guilty spouse who is the villain of the marriage drama and who alone is responsible for the breakdown of the marriage. Beside this villain is placed an innocent spouse who is depicted as no longer able to endure the villain's actions and who is accordingly entitled to divorce.

Obviously this scenario is far removed from the realities of married life in which both parties, of course to varying degrees, contribute to the failure or breakdown of their marriage. Tredgold J vividly captured the reality of married life when in *Baines v Baines*<sup>35</sup> he said:

“... it is seldom in a matrimonial dispute that the faults are all on one side.”

The fault principle permits only the innocent spouse to bring an action for the dissolution of the marriage and thus allows the so-called innocent spouse to keep the so-called guilty spouse indefinitely bound to a marriage which has long ceased to exist in fact, having become an empty legal shell valid only in the eyes of the law but dead for all practical purposes.

Further, the grounds for divorce under the fault system such as adultery and desertion are in reality usually the *result*, and not the *cause*, of marital breakdown. Often by the time one spouse deserts or commits adultery the marriage would have long broken down.

Perhaps it was in the light of these and other shortcomings of the guilt principle that in August 1976 the government of Rhodesia set up a Commission of Inquiry into the divorce laws of the country. One of the Commission's tasks was to inquire into the law of Rhodesia relating to the grounds upon which a divorce may be granted and to “report whether any changes in the present law of Rhodesia are necessary or desirable and, if so, to what extent.” The Commis-

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<sup>35</sup> 1944 SR 135 at p.137.

sion duly carried out its mandate and presented its report entitled "Report into Divorce Laws, 1977" to the President on 23rd September 1977. In its Report the Commission recommended *inter alia*, that the "sole ground for granting a divorce shall be irremediable or irreparable failure" of marriage.<sup>36</sup>

The Government of Rhodesia did not act on this recommendation until it collapsed in 1980 and was succeeded by the government of independent Zimbabwe. However, as stated earlier, the old general law grounds for divorce were abolished in 1985 by the independent government of Zimbabwe through the Matrimonial Causes Act, No. 33 of 1985. The old customary law grounds for divorce, however, remained operational until they were abolished by the Matrimonial Causes Amendment Act, No. 11 of 1987 which came into operation on 11th December 1987. The effect of the 1987 amendment of the Matrimonial Causes Act was to rationalise and unify the law of divorce so that all valid marriages, whether under customary law or general law, became subject to the same divorce laws as embodied in that Act.<sup>37</sup> Accordingly, the grounds for the dissolution of customary law and general law marriages are now the same. The only difference being that general law marriages can be dissolved only by the High Court whereas customary law marriages can be dissolved by any court which is competent to apply the provisions of section 4 of the Matrimonial Causes Act, even though in practice they are dissolved by the community court.<sup>38</sup>

## II THE NEW NO FAULT DIVORCE LAW

The new divorce law of Zimbabwe which is contained in sections 4, 5 and 6 of the Matrimonial Causes Act applies equally to all valid marriages.

The new divorce law of Zimbabwe which became operational on 7th February 1986 and which is contained in sections 4, 5 and 6 of the Matrimonial Causes Act applies equally to all valid marriages whether contracted under general law or customary law. This is so because section 2 of the Act includes in the term "marriage", marriages registered in terms of African Marriages Act, Chapter 238.

With respect to the new divorce law, section 4 provides that:

"A marriage may be dissolved by a decree of divorce by an appropriate court only on the ground of:

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<sup>36</sup> Paragraph 45.

<sup>37</sup> This is achieved by the definition of "marriage" in section 2 where marriage is defined as "including a marriage contracted in terms of customary law under the African Marriages Act, Cap. 238."

<sup>38</sup> The only other court of first instance with competency to apply the provisions of section 4 of the Matrimonial Causes Act is the High Court and hence a customary law marriage can be dissolved either by the High Court or Community Court. This is because the term "appropriate court" is defined as meaning the High Court "in relation to any marriage" and a community court in relation to a customary law marriage. (Section 2).

- (a) irretrievable break-down of the marriage as contemplated by section five;
- (b) incurable mental illness or continuous unconsciousness of one of the parties to the marriage as contemplated by section six."

This provision is borrowed from section 3 of the South African Divorce Act, 70 of 1979, and our law now recognizes two grounds of divorce, namely irretrievable breakdown of marriage and mental illness or continuous unconsciousness. It may be asked why mental illness or continuous unconsciousness were abstracted from irretrievable breakdown and made a separate ground. It would appear that the legislature drew a distinction between marriages which have become impossible as a result of circumstances beyond the control of the parties, that is, mental illness or continuous unconsciousness and those marriages which collapse as a result of the parties' conduct. There appears to be no sound logic in this distinction for a marriage that has become impossible as a result of uncontrollable conditions such as incurable mental illness is as irretrievably broken down as one which has failed as a result of the parties' conduct. Accordingly, whether a marriage has broken down as a result of the conduct of the parties or as a result of uncontrollable conditions such as mental illness should not be a consideration. The simple fact is that the marriage has broken down. The cause of the break down is irrelevant and the marriage should be dissolved. The uselessness of the distinction has been borne out in South Africa where the courts have held that a marriage can be irretrievably broken down as a result of mental illness or continuous unconsciousness.<sup>39</sup>

It will be recalled from above that section 4 of the Act states that a marriage may be dissolved under certain conditions. The use of the word "may" clearly indicates that the courts have a discretion to refuse to order a decree of divorce even if the marriage has irretrievably broken down or one of the spouses is mentally ill or unconscious. It may be objected that this discretion is senseless and useless. Further, it could be argued that once a marriage has been shown to have irretrievably broken down the court should have no discretion but must dissolve it for the court cannot resuscitate or breathe life into a dead marriage.

Indeed, there is substance in such objections and arguments. However, it is submitted that this discretion will cause no adverse effects if it is used with caution and for the interests of the public and the parties concerned. It is suggested that our courts should refuse to order a decree of divorce where a marriage has been shown to have broken down *only* if the granting of the divorce would cause grave hardship to one of the parties or to the children of the marriage. It is emphasized that the hardship must be shown to be grave before a court

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<sup>39</sup> See *Krige v Smit* 1981 (4) SA 409 and *Ott v Raubenheimer N.O.* 1985 3 (SA 851 (0)).

exercises its discretionary power. It is indeed most likely that our courts will exercise the discretion given in section 4 with great caution.<sup>40</sup>

### A. Irretrievable Breakdown

The main problem presented by the concept of the irretrievable breakdown of marriage is that of determining when a marriage can be said to have irretrievably broken down. Section 5(1) of the Matrimonial Causes Act provides the test for determining whether a marriage has irretrievably broken down or not by providing that:

"An appropriate court may grant a decree of divorce on the grounds of irretrievable breakdown of the marriage if it is satisfied that the marriage relationship between the parties has broken down *to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them.*" [Emphasis supplied]

This means that whether a marriage has irretrievably broken down or not is a question of fact to be determined by reference to all the relevant facts and circumstances of each case. The test to be applied or the question to be posed in every case is: Having regard to all the available evidence is there a reasonable prospect that the parties will restore a normal marriage relationship between themselves? If the answer is in the affirmative then the marriage has not irretrievably broken down and if it is in the negative then the marriage has irretrievably broken down and must be dissolved.

The provisions of the above quoted test lay down two requirements for the dissolution of a marriage, namely that the marital relationship between the spouses must have become abnormal and that there must exist no reasonable prospect of a normal marital relationship being restored between them. Accordingly, a court must first determine whether or not the marital relationship of the parties is normal. If the relationship of the parties is found to be normal then the marriage of the parties has not broken down. The question to be answered in this respect is, when is a marital relationship no longer normal? The answer can only be found by reference to the facts and circumstances of each case. It is neither possible nor practical to provide a general test for the identification of a marital relationship that is normal or not normal. In other words, it is not possible to break up a normal marital relationship into its constituent elements so that when one or more of them are absent it can be said that the marriage is no longer normal. However, as a general rule it can be said that a normal marital relationship no

<sup>40</sup> Note that in *Schwartz v Schwartz* 1984(4)SA 467 (AD) the South African Appellate Division held that while the word "may" does not mean "must", nonetheless there was no residual discretion to permit a court to refuse a divorce if irretrievable breakdown has been proved. The practical effect of this interpretation is to make the granting of a decree peremptory whenever a breakdown is established. Grave financial or other hardship cannot serve in South Africa as a reason for sustaining a marriage that has become an empty shell. It may be that this is a correct and desirable approach.

longer exists between the spouses, when one or both of the spouses has acted or acts in a manner that has brought or will bring the marriage *consortium*<sup>41</sup> to an end.

Secondly, where the marital relationship is found to be abnormal, the court must satisfy itself whether or not there are reasonable prospects that the marriage will be restored to its normal state. If such a possibility exists the marriage would not have broken down irretrievably and the provisions of section 5(3) would come into operation. These provide that:

“If it appears to an appropriate court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings to enable the parties to attempt a reconciliation.”

However, if the parties find it impossible to reconcile after they have been given the opportunity to do so, their marriage can be said to have irretrievably broken down and it should thereafter be dissolved.

It is unlikely that the courts will have any difficulty in applying the concept of irretrievable breakdown to real life cases. It should not be difficult to determine whether or not, in each case, there is or is not a reasonable prospect of the restoration of a normal marriage relationship once it has been found that the marital relationship between the parties is no longer normal. Indeed, the conduct of the parties in court, their attitude towards each other and towards their marriage would often assist the court in deciding the question one way or the other.

In addition to the above test as contained in section 5(1) of the Act, section 5(2) provides the court with certain guidelines to assist in determining whether a marriage has irretrievably broken down or not. This section provides that:

“Subject to the provisions of subsection (1) and without derogation from any other facts or circumstances which may show the irretrievable breakdown of a marriage, an appropriate court may have regard to the fact that —

- (a) the parties have not lived together as husband and wife for a continuous period of at least twelve months immediately preceding the date of the commencement of the divorce action; or
- (b) the defendant has committed adultery which the plaintiff regards as incompatible with the continuation of a normal marriage relationship; or

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<sup>41</sup> Consortium embraces the totality of a number of rights and duties created by the married status between the spouses. These include companionship, love, affection, comfort, mutual services, fidelity and exclusive sexual privileges. See generally, *Naido v Naido* 1985(1) SA 366 (T) and *L v J* 1985(4) SA 371 (C).

- (c) the defendant has been sentenced by a competent court to imprisonment for a period of at least fifteen years or has, in terms of the law relating to criminal procedure, been declared a habitual criminal or has been sentenced to extended imprisonment and has, in accordance with such declaration or sentence, been detained in prison for a continuous period of, or for interrupted periods which in the aggregate amount to at least five years, within the ten years immediately preceding the date of commencement of the divorce action; or
- (d) the defendant has, during the subsistence of the marriage —
  - (i) treated the plaintiff with such cruelty, mental or otherwise; or
  - (ii) habitually subjected himself or herself, as the case may be, to the influence of intoxicating liquor or drugs to such an extent;
 

as is incompatible with the continuation of a normal marriage relationship;

as proof of irretrievable breakdown of the marriage.<sup>42</sup>

These guidelines are perhaps more than guidelines for it would appear that once the existence of one or more of the situations described above has been established, the court is constrained to conclude as a matter of course that the marriage has irretrievably broken down. Thus proof of the existence of any of the situations described in section 5(2) creates a presumption that the marriage has irretrievably broken down. It would require very strong evidence from the party contesting the divorce to rebut this presumption by showing that the marriage has in fact not broken down irretrievably, notwithstanding the existence of one or more of the situations described in section 5(2).

Before discussing the guidelines individually it should be observed that these guidelines are not meant to be exhaustive of the situations, facts or circumstances which may show the irretrievable breakdown of marriage. This is clear from the use of the words “without derogation from any other facts or circumstances which may show the irretrievable breakdown of a marriage an appropriate court may have regard to the fact that—”. Thus, the courts are free to regard fact situations other than those tabulated; as evidence of the irretrievable breakdown of a marriage.

It will also be noticed that these guidelines bear a close resemblance to the old grounds for divorce based on the fault principle. The question that arises is whether the formulation of the guidelines means that a “guilty” spouse cannot

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<sup>42</sup> Note that these guidelines are basically borrowed from section 4 of the South African Divorce Act (*supra*), except for the guideline in paragraph (d) in respect of cruelty. This difference is explained by the fact that cruelty was not a ground for divorce in South African law prior to the enactment of the Divorce Act.

rely on his or her own contrary behaviour to establish that his or her marriage has irretrievably broken down in order to be granted a divorce. The question arises because the formulation of the guidelines in paragraphs (b), (c) and (d) is such that only the "innocent" spouse can sue for divorce on the basis of the situations therein provided. For example, in paragraph (b) the court is empowered to regard "the defendant's" adultery which the plaintiff regards as incompatible with the continuation of the marriage as evidence of breakdown. What if it is the plaintiff who has committed and continues to commit adultery so that the marriage has broken down as a result of his or her own adultery, and he or she wishes to rely on this adultery to establish the irretrievable breakdown of his or her marriage?

It is respectfully submitted that the present formulation of the guidelines does not detract from the generality of the general test as provided in section 5(2). The material question in each case should be whether or not the marital relationship of the parties is no longer normal and, if it is not, whether or not there is a reasonable prospect that it can be restored to its normal state. The question whether or not it is the plaintiff's or defendant's conduct that caused the breakdown is irrelevant to the determination of whether or not as a matter of fact the marriage has irretrievably broken down. Accordingly, it is submitted that a spouse can rely on his or her own conduct, be it adultery or cruelty, to establish that the marriage has irretrievably broken down.

Indeed, this has been the approach of the South African courts as is illustrated by the facts and decision in *Kruger v Kruger*.<sup>43</sup> In this case the parties had been married in 1940. In 1953 the plaintiff had left the matrimonial home to live with his lover, one Mrs. Heyward with whom he had earlier developed an intimate relationship. On a number of occasions the plaintiff had pleaded with the defendant to divorce him but the defendant had refused. After the passing of the Divorce Act and the introduction of irretrievable breakdown as a ground for divorce the plaintiff sued for a decree of divorce asserting that the marriage had irretrievably broken down as a result of his own adultery. The court granted him divorce.

It is clear that the adultery which was the basis of the breakdown in this case was the plaintiff's and accordingly not the adultery contemplated in section 4(2)(b) of the South African Divorce Act. Nevertheless the court granted the decree of divorce on the general premise that the marriage had broken down as envisaged in the general section, namely section 4(1). This section lays down the test for breakdown as the disintegration of the marriage relationship to the extent that reasonable prospects of restoring it to a normal state do not exist. It is submitted that the decision in *Kruger v Kruger* (*supra*) is not only a correct interpretation of the law but also constitutes a socially desirable approach.<sup>44</sup>

Further, this approach has been confirmed by the South African Appellate

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<sup>43</sup> 1980(3) SA 283(0).

<sup>44</sup> It was also decided in *Kruger v Kruger* that it is no longer necessary for the courts to condone a plaintiff's adultery.

Division in *Schwartz v Schwartz* (*supra*). The facts of the *Schwartz* case revealed a sad and vain attempt by a woman to preserve her marriage of some twenty-three years in the face of her husband's involvement with and desire to marry another woman. After the parties had been married the wife had given up her studies to seek employment so as to support the family which included two children of the marriage, while the husband continued with his studies. When the husband finished his studies he set up a private practice in which the wife handled the administrative and financial affairs. The husband later began to commit adultery with nurses and nursing sisters and in 1977 he met one Miss Lintvelt with whom he started an adulterous affair which subsisted for some five and a half years before he eventually brought the action for divorce. The husband had in fact lived with Miss Lintvelt for over 2 years in a home of their own before he brought the divorce action.

In his evidence the husband stated that he wanted to have his marriage dissolved so that he and Miss Lintvelt could marry each other. He declared that he would be very despondent, upset and emotionally disturbed were his relationship with Miss Lintvelt to be terminated. He, however, admitted that he still admired and respected his wife (the respondent) whom he regarded as "a good woman" and a "true and supporting wife". However, he did not have for her the love which he had for Miss Lintvelt.

On the other hand the respondent testified that she wished, despite everything, to preserve her marriage with her husband (the appellant) whom she still loved "very, very much". She did not believe that her husband no longer loved her and pointed out how happy their marriage had been before Miss Lintvelt came onto the scene. She further stated that she was totally dependant on the appellant and the grant of a decree of divorce would cause her grave financial and other hardship.

The trial judge had found that the husband was "passing through a period of uncertainty" and that his behaviour in a court was "an indication of abject misery" with no true desire of completely breaking his relationship with his wife. Accordingly, he was denied a decree of divorce on the basis that irretrievable breakdown had not been proved.

On appeal by the husband the Appellate Division held that the appellant had established that his marriage had irretrievably broken down and was entitled to a decree of divorce. The court stated that moral right and wrongs were not in issue and that irretrievable breakdown can come about as a result of the errant conduct of one spouse in spite of the steadfast desire of the other to continue the marriage. The court also held that grave financial or other hardship could not serve as a reason for sustaining a marriage that had been shown to have irretrievably broken down.<sup>45</sup>

The decisions in *Kruger v Kruger* and *Schwartz v Schwartz* (both *supra*) are

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<sup>45</sup> See also *Matyila v Matyila* 1987(3) SA 230 and *Kritzinger v Kritzinger* 1987(2) SA 357.



a correct interpretation of the law. It is hoped that Zimbabwean courts would adopt the same approach since it is totally consistent with the language of sections 4 and 5 of the Matrimonial Causes Act.

It is also relevant to refer to two further decisions of the courts of South Africa. In *Krige v Smir*<sup>46</sup> the plaintiff instituted an action against the defendant for a decree of divorce on the ground of irretrievable breakdown of the marriage in terms of section 4 of the Divorce Act. The defendant had suffered incurable brain damage and had been hospitalized but had not been in a state institution for a period of at least two years as is required by section 5(2) of the Act. Nor had the defendant been continuously unconscious for a period of 6 months even though he was paralysed and in a semi-conscious state. The court held that irretrievable breakdown had been established and that the plaintiff was entitled to an order of divorce on that ground, she not being obliged to rely on the ground of incurable mental illness or continuous unconsciousness under which the defendant would have had to have been in a state institution for a period of two years or to have been in a state of unconsciousness for a period of at least six months.

Again in *Ott v Raubenheimer NO* (*supra*) the court found that, as the marriage had irretrievably broken down long before the plaintiff's wife had entered a mental institution and been certified as mentally ill, the plaintiff was entitled to rely on section 4(1) of the Divorce Act and was not obliged to rely on his wife's mental illness within the framework of section 5 of the Act. The fact that the breakdown had occurred as a direct result of the wife's mental illness was held to be irrelevant.

# 1. Factors Indicating Breakdown

## a. One Year Separation

Paragraph (a) of section 5(2) provides that the court may regard as evidence of irretrievable breakdown the fact that "the parties have not lived together as husband and wife for a continuous period of at least twelve months" immediately preceding the date of commencement of the divorce action as a ground for divorce. Two questions arise from this provision. Firstly, what is meant by the term "have not lived together as husband and wife"? It is submitted that this phrase does not merely refer to geographic or physical separation but incorporates the termination of *consortium*. Thus, spouses who have lived under the same roof but have, for a continuous period of 12 months, terminated the *consortium* between themselves by, for example, ceasing to have sexual relations, are included in the guideline. However, parties seeking to rely on not having lived "together as husband and wife" when they have in fact lived under the same roof would be required to prove that even though they lived in the same house, their *consortium* had ended and that this termination had lasted for the

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<sup>46</sup> 1981(4) SA 409.

required period of time. In short, it is submitted that it is enough to satisfy the requirements of section 5(2)(a) to prove that although the parties have lived under the same roof they have not in fact accorded each other the *consortium omnis vitae* for a continuous period of 12 months. In that event they would not have lived together as "husband and wife" for the required period of time.

On the other hand, termination of *consortium* would be presumed in cases in which the parties had been physically separated for a period of 12 months or more. Thus the mere proof of geographical or physical separation for the required period would suffice to satisfy the requirements of the relevant provision.<sup>47</sup>

The second point arising from section 5(2)(a) is that in order to satisfy the requirements of paragraph (a) the parties must have lived apart for a continuous uninterrupted period of 12 months. Accordingly, the requirements of the guideline would not be met in cases in which the 12 months of separation had been interrupted by an attempt or attempts to reconcile. However, this does not mean a decree of divorce cannot be ordered in these circumstances. The guidelines are not absolute and therefore do not have to be wholly satisfied before a marriage can be said to have broken down irretrievably. An unsuccessful attempt at reconciliation, which interrupts the period of separation, may in fact be an indication that the marriage is beyond salvage. However, if a divorce is to be granted where the period of separation has been interrupted by an attempted reconciliation, it would have to be granted under the general test of irretrievable breakdown and not under the specific provisions of paragraph (a) of section 5(2). This is so since it remains open to the parties to prove that even though their case does not fall squarely into any of the listed fact situations their marriage has nonetheless broken down irretrievably.

#### b. *Adultery*

Paragraph (b) empowers the court to regard the fact "that the defendant has committed adultery which the plaintiff regards as incompatible with the continuation of a normal marriage relationship" as evidence of breakdown.

The word adultery, of course, carries its usual meaning as discussed above in connection with the old law of divorce. Adultery must be proved on a balance of probabilities. However, unlike under the old law mere proof of adultery does not appear to satisfy the requirements of paragraph (b). In addition to proving the act of adultery the plaintiff must further convince the court that he or she finds the adultery incompatible with the continuation of his or her marriage. It is submitted, however, that the courts should presume that the plaintiff regards the adultery as having been destructive of the marriage unless the contrary is shown in all cases in which the act of adultery has been proven. In other words, the further requirement that the plaintiff must show that he or she finds the continuation of his or her marriage intolerable as a result of the defendant's

<sup>47</sup> See for example *Muchada v Muchada* HC-H-346-86 where the High Court dissolved a marriage on mere proof of physical separation for 12 months.

adultery should be presumed to have been satisfied whenever the act of adultery has been proved. Indeed, the fact that the plaintiff has brought the divorce action would indicate that he or she regards the act of adultery as having been destructive of the marriage relationship.<sup>48</sup> This argument is further supported by the fact that the test for the determination of whether or not the plaintiff finds the adultery to be incompatible with the continuation of the marriage is completely subjective. Indeed, an allegation by the plaintiff that he or she regards the adultery as incompatible with the continuation of his or her marriage cannot be rebutted so that the plaintiff's allegation to this effect is sufficient to satisfy the requirement of paragraph (b). This should also be true in cases where the plaintiff has had sexual intercourse with the defendant after the discovery of the adultery since the question of condonation is irrelevant under the breakdown principle. In other words, unsuccessful attempts at condonation, reconciliation or resumption of sexual relations do not destroy the plaintiff's entitlement to divorce because the question that concerns the court is whether the marriage has broken down or not. Thus, an unsuccessful resumption of sexual intercourse, merely serves as further evidence of the fact that the marriage has broken down. The plaintiff's stance would simply be that in spite of his or her efforts at reconciliation he or she is unable to reconcile himself or herself to the fact that his or her spouse had sexual intercourse with someone else.

Accordingly, the position taken by the old law that condonation (presumed where sexual intercourse took place between the spouses after the discovery of the adultery) of the defendant's adultery by the plaintiff extinguishes the adultery as though it had not taken place is irrelevant to the issue of whether or not the marriage has irretrievably broken down. If the plaintiff insists that notwithstanding the attempted condonation he or she cannot reconcile himself or herself to continuing the marital relationship the marriage should be regarded as having irretrievably broken down.

Zimbabwean courts have so far granted divorce on the ground of irretrievable breakdown caused by adultery in the cases of *Shonge v Shonge and Anor*<sup>49</sup> and *Mhlanga v Kateya*.<sup>50</sup> However, in both these cases the actions for divorce were not opposed for the parties were agreed that the acts of adultery and other factors had resulted in the breakdown of their marriages.

### c. Imprisonment

Paragraph (c) empowers the court to regard the fact that a spouse has been sentenced to imprisonment for a period of at least 15 years or has been declared a habitual criminal and has served five years of his or her sentence as evidence that his or her marriage has irretrievably broken down. This guideline is identical to the old ground of divorce provided for in section 3(b) of the repealed Matrimonial Causes Act, Chapter 39 and therefore needs no further explanation.

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<sup>48</sup> See generally *Grosso v Grosso* 1987(1) SA 48 (C).

<sup>49</sup> IIC-H-414-86.

<sup>50</sup> HC-H-427-86.

However, it is submitted that there is nothing to prevent a plaintiff whose spouse has been sentenced to a term of imprisonment shorter than 15 years, or who has not served the required five years of the sentence, from relying on the general principles of irretrievable breakdown to obtain a decree of divorce. The basis for divorce in this case would be that the commission of the crime and the subsequent conviction and imprisonment of the defendant have resulted in the breakdown of the marriage. As long as it can be shown that the commission of the crime and the subsequent imprisonment have in fact resulted in the irretrievable breakdown of the marriage the general requirements of breakdown would have been satisfied and there would be no need to refer to the provisions of the guideline in paragraph (c).

Indeed the formulation of this guideline seems unreasonable. There appears to be no logical reason for setting the defendant's sentence at 15 years in order to qualify as a ground for divorce when shorter sentences would also seriously disrupt a marriage. Further, there are few criminal offences that attract such long terms of imprisonment. Even more unreasonable is the requirement that the defendant should first serve 5 years of his or her sentence before the plaintiff can rely on the guideline to obtain a decree of divorce on the basis that the marriage has broken down as a result of the defendant's conviction and subsequent imprisonment. This provision becomes even more unreasonable upon comparison with paragraph (a) of section 5(2) which entitles a spouse to rely on a mere 12 months separation as evidence of breakdown. In any event, a plaintiff whose spouse has been in prison for 12 months can rely on the fact of the 12 months separation as evidence of breakdown in terms of paragraph (a) since the spouses would not "have lived together as husband and wife" for the period required by the paragraph. Twelve months separation caused by imprisonment is as much evidence of breakdown as any separation of 12 months' duration regardless of the cause.

It is submitted, therefore, that this guideline would have made more sense and would have been more effective, if conviction and a sentence to any term of imprisonment had been considered sufficient evidence of breakdown. The plaintiff would simply be asserting that he or she cannot reconcile himself or herself to living with a convicted criminal.

#### *d. Cruelty*

Under paragraph (d)(i) the court may regard the fact that the "defendant has, during the subsistence of the marriage treated the plaintiff with such cruelty" as is incompatible with the continuation of the marriage as proof of the irretrievable breakdown of the marriage. Under paragraph (d)(ii) the fact that the defendant has subjected himself or herself to the influence of intoxicating liquor or drugs in a manner or to such an extent as is incompatible with the continuation of a normal marriage relationship may also be taken as proof of the fact that the marriage has irretrievably broken down.

Cruelty retains the meaning ascribed to it under the old law. It remains some grave conduct which has caused or is likely to cause danger to the life, limb or

health, physical or mental, of the other party. Again, as under the old law, an intention to injure the other party is not a requirement for an action for divorce on the ground of cruelty.

In *Khoza v Khoza*,<sup>51</sup> the High Court ruled that the fact that plaintiff had:

- (i) indulged in intimate relationships with other women;
- (ii) failed to adequately maintain the defendant and the children;
- (iii) pursued his pleasures without regard to the defendant and the children; and
- (iv) deserted the defendant without just cause

amounted to such cruelty as rendered the continuation of the marriage insupportable.<sup>52</sup>

Whether a spouse's conduct amounts to cruelty or not is a question of fact that has to be determined on the particular facts of each case. The court must be satisfied that the conduct complained of bears the character of cruelty in that it is so much more damaging than the ordinary wear and tear of married life that the defendant can no longer be expected to endure it. Once the plaintiff has proved that the defendant's conduct bears the character of cruelty the court, as a matter of course, should conclude that the cruelty is incompatible with the continuation of a normal marriage relationship and accordingly grant a decree of divorce.

## 2. *Does the Principle of Irretrievable Breakdown Embody Divorce by Consent?*

The principle of irretrievable breakdown is a vague concept which does not easily lend itself to precise definition. The question of whether or not a particular marriage has irretrievably broken down is a matter to be decided by the court and accordingly depends quite heavily on the discretion of the court. However, the court's discretion is limited, particularly in cases where the parties have agreed that their marriage has broken down and ought to be dissolved. In such situations the parties would simply agree that the defendant would not challenge the plaintiff's allegation of irretrievable breakdown. In this event, the court would have little option but to accept the plaintiff's unchallenged evidence and grant

<sup>51</sup> HC-B-106-87.

<sup>52</sup> See also *Mujati v Mujati* IIC-H-505-87 where a divorce was granted on the ground of irretrievable breakdown based on cruelty whose particulars as outlined by the plaintiff had not been challenged by the defendant; *Masocha v Masocha* IIC-H-183-87 where it was decided that the fact that the defendant improperly associated with other men and failed to treat plaintiff with love, affection and consideration amounted to cruelty which rendered the continuation of married life insupportable and *B v B* 1969(2) SA 584 (R) where it was stated that "his excessive drinking and negligent behaviour and perpetual dishonesty must have been a source of great unhappiness to his wife."

a decree of divorce.<sup>53</sup> In these circumstances, therefore, divorce would essentially be available on the consensus of the parties. Indeed, this is true of any divorce law including that based on the fault principle for parties can always agree to choose the most convenient ground on which to seek divorce and further agree that the defendant would not defend the action. Thus, any law of divorce allows opportunities for divorce by consensus.

## B. Mental Illness or Continuous Unconsciousness as Grounds for Divorce

As indicated earlier, irretrievable breakdown and incurable mental illness or continuous unconsciousness of one of the parties are the only two grounds of divorce recognized in Zimbabwe under section 4 of the Matrimonial Causes Act.

It has been indicated above that the distinction between irretrievable breakdown and mental illness or continuous unconsciousness is unsound since mental illness and continuous unconsciousness are clearly variants of irretrievable breakdown.<sup>54</sup> For this reason, it is likely that this ground of divorce would be unpopular in practice and that spouses would more readily rely on the ground of irretrievable breakdown in most cases including cases in which mental illness or continuous unconsciousness are involved.

The circumstances in which incurable mental illness or continuous unconsciousness of the defendant would amount to a ground for divorce are laid down in section 6 of the Act. This section provides that:

“(1) Subject to the provisions of subsection (2), an appropriate court may grant a decree of divorce on the grounds of mental illness or continuous unconsciousness of the defendant if satisfied, as the case may be, that —

- (a) the defendant is suffering from a mental disease or defect and has been under care and treatment for a continuous period of, or for interrupted periods which in the aggregate amount to, at least five years, within the ten years immediately preceding the date of commencement of the divorce action; or
- (b) the defendant is by reason of a physical disorder in a state of continuous unconsciousness which has lasted for a period of at least six months immediately preceding the date of commencement of the divorce action;

<sup>53</sup> See, for example *Mhlanga v Kateya* IIC-II-427-86, *Mujati v Mujati* (*supra*); *Masango v Masango* HC-H-107-87 and *Masocha v Masocha* IIC-H-183-87. In all these cases the plaintiff's evidence was unchallenged and the courts had to accept that evidence and grant divorce. There is little choice in these circumstances.

<sup>54</sup> See for example the decisions of the South African Courts in *Krige v Smith* (*supra*) and *Ott v Raubenheimer NO* (*supra*) both discussed *ibid*.

- and that there is no reasonable prospect that he will be cured or will regain consciousness, as the case may be.
- (2) An appropriate court shall not grant a divorce on any ground referred to in subsection (1) unless it is satisfied by the evidence of at least three medical practitioners, of whom two shall be psychiatrists appointed by the court, as to the matters referred to in paragraph (a) or (b), as the case may be.
  - (3) For the purposes of this section a person shall be deemed to be under care and treatment —
    - (a) while he is detained in pursuance of any order or warrant issued under the law of Zimbabwe or of any other country which relates to mental disorder; or
    - (b) while he is receiving treatment as a voluntary patient under any such law;

and in no other case."

The requirements of this section are self-evident and require little elaboration. To obtain a divorce on the ground of mental illness, the plaintiff must satisfy the court that —

- (a) the defendant is suffering from a mental disease or defect;
- (b) the defendant has been under care and treatment, that is to say, he or she has been detained in an institution as a mental patient or has been voluntarily receiving treatment as a mental patient, for a period of five years within the ten years immediately preceding the date of commencement of the action;
- (c) there is no reasonable prospect that the defendant will be cured;
- (d) there is evidence from three medical practitioners, at least two of whom are psychiatrists, confirming the above three matters, namely that the defendant is suffering from incurable mental disease or defect and has been under care and treatment for a period of 5 years.

To obtain a divorce on the basis of continuous unconsciousness the plaintiff must satisfy the court that —

- (a) due to a physical disorder the defendant is in a state of continuous unconsciousness;
- (b) the state of continuous unconsciousness has lasted for a period of at least 6 months immediately preceding the date of commencement of the divorce action;

- (c) there is no reasonable prospect that the defendant will regain consciousness;
- (d) there is evidence from at least three medical practitioners, of whom two must be psychiatrists, confirming the above matters, namely that the defendant has been unconscious as a result of a physical disorder for a continuous period of at least three months with no reasonable prospect that he or she will regain consciousness.<sup>55</sup>

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<sup>55</sup> There is as yet no Zimbabwean case in which divorce has been granted on this ground and it is unlikely that there will be one in the foreseeable future.





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